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No. 90-1090

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:	Page
Carlson v. *Landon*, 342 U.S. 524 (1952)	6
McNary v. *Haitian Refugee Center Inc.*, 111 S. Ct. 888 (1990)	2
Udall v. *Tallman*, 380 U.S. 1 (1965)	4
United States v. *Witkovich*, 353 U.S. 194 (1957)	6
Statutes and regulations:	
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
§ 212(a)(14), 8 U.S.C. 1182(a)(14)	6
§ 242, 8 U.S.C. 1252	7
§ 242(a), 8 U.S.C. 1252(a)	6, 7
§ 242(a)(1), 8 U.S.C. 1252(a)(1)	1, 7
§ 242(d), 8 U.S.C. 1252(d)	6
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359	5-6
8 C.F.R.:	
Section 103.6(a)(2)(ii)	3
Section 109.1 (1984)	4
Section 274a.12(a)	3
Section 274a.12(b)	3
Section 274a.12(c)	4
Section 274a.12(c)(13)	4
Section 274a.14(a)(1)(ii)	4
Miscellaneous:	
48 Fed. Reg. 51,143 (1983)	3
H.R. Rep. No. 1192, 81st Cong., 1st Sess. (1949)	8

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In this nationwide class action, the court below has held invalid an important regulation issued by INS—a regulation requiring that when an alien is released on bond pending a determination of deportability, the bond contain a condition forbidding employment while the deportation proceedings are pending, unless the alien either shows that he falls within one of several statuses for which employment is authorized or obtains work authorization under a related regulation. Section 242(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1252(a)(1), provides that a release bond may contain "such conditions as the Attorney General may prescribe," and the primary question presented for this Court's review is whether the court below erred in holding that the regulation

exceeds the authority conferred on the Attorney General, and his delegate the INS, by this Section.

Although the respondents' brief in opposition buries the reader in a blizzard of verbiage, it does nothing to undermine the importance of this question or to explain why it does not warrant this Court's review. Indeed, most of the discussion does not require response at this stage, since it is directed not to the question whether the petition should be granted but to the merits of the underlying dispute.

1. *Jurisdiction.* The first question presented—whether the district court had subject matter jurisdiction—was included in the petition because, at the time of filing, *McNary* v. *Haitian Refugee Center Inc.*, No. 89-1332, had been argued before the Court and was awaiting decision. On February 20, 1991, the Court decided that case by affirming the decision below and upholding the district court's jurisdiction. 111 S. Ct. 888. In view of that decision, we withdraw the first question, and ask the Court to grant review limited to the second question presented in the petition.

2. *The merits.* With respect to the second question—whether the court below erred in invalidating the regulation—much of the brief in opposition is devoted to the issue whether the regulation precludes aliens released on bond from engaging in *any* employment (unless specific permission to work is obtained), or only from engaging in unauthorized employment. For two reasons, this issue is not one that should deter the Court from granting plenary review. First, any ambiguity in the regulation is resolved by INS's own explanation at the time the final regulation was issued—an explanation that clarifies the scope and purpose of the rule and that is entitled to deference. Second, and more important, the court

below left no doubt that its opinion did not turn on its construction of the rule. On the contrary, the court struck down the regulation on the basis of a narrow and insupportable reading of the Attorney General's statutory authority, under which even a condition strictly limited to the prohibition of unauthorized employment would clearly be proscribed.

a. At several points, *e.g.*, Br. in Opp. 9, 10, 13, 14, respondents suggest that the challenged regulation imposes a "no work" condition that can only be avoided by obtaining a specific determination from a District Director that employment is appropriate. This contention is contradicted not only by the regulation itself, which is directed at "unauthorized" employment, 8 C.F.R. 103.6(a)(2)(ii); Pet. App. 123a, but by the agency's explanation accompanying the final regulation, see 48 Fed. Reg. 51,143 (1983); Pet. App. 142a-143a. Thus, as stated in that explanation, "permanent resident aliens are not affected by these release conditions. Until such time as permanent resident status is lost, the permanent resident alien has the right to work in the United States, if released on bond. The Service, therefore, has no intention of applying this condition to a permanent resident alien in exclusion or deportation proceedings." *Ibid.* Moreover, "[a]liens who have applied for asylum [and who are governed by 8 C.F.R. Part 208] will not be affected by these regulations." *Ibid.* And, as explained in our petition, at 19-20, the condition will likewise not be applied to any alien who is entitled to work by virtue of any of a number of other statuses that automatically convey work authorization. See 8 C.F.R. 274a.12(a) and (b); Pet. App. 127a-132a.[1] Persons holding such

[1] Contrary to respondents' assertions, Br. in Opp. 8, work authorization conveyed by status, pursuant to these provisions,

statuses should, moreover, readily be able to prove that fact. See Pet. 19-20 & n.15. Thus, the true effect of the regulation is to shift to the apprehended alien the burden of showing that he is authorized to engage in employment. Furthermore, those aliens who cannot readily establish a pre-existing status conferring work authorization remain free, under the regulations, to apply for temporary work authorization pending the outcome of their deportation proceedings.[2]

As further explained in our petition, at 19 n.13, to the extent that the regulation itself is ambiguous, the court of appeals erred in rejecting INS's reading of it. This Court has on many occasions stressed the obligation of a reviewing court to defer to an agency's interpretation of its own regulation. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

b. If the only error of the court below had been its failure to give proper deference to the agency's reading of its regulation, the decision might not merit further review. Although that error does misconceive the appropriate relationship between an agency and a reviewing court, the harm to the agency's administration of the law could be corrected, at least prospectively, by revising the regulation to eliminate the perceived ambiguity.

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does not terminate upon the initiation of deportation proceedings. Only individual work authorizations previously issued pursuant to 8 C.F.R. 274a.12(c) are terminated under the provision respondents cite. See 8 C.F.R. 274a.14(a)(1)(ii).

[2] Respondents' supposition that there is no longer any provision under which aliens released on bond can apply for temporary work authorization, Br. in Opp. 14, is flatly incorrect. As we have explained previously, Pet. 7 n.4, the provisions of 8 C.F.R. 109.1 (1984) have merely been amended and recodified at 8 C.F.R. 274a.12(c)(13).

But the error of the court of appeals was much more fundamental. As both the court's ruling and respondents' brief reflect, the pivotal issue in this case is not the interpretation of the nuances of the existing regulations, but the delineation of the Attorney General's statutory authority. Respondents' discussion only reinforces the broad sweep of the ruling they attempt to defend.

While the lengthy decision below is not without its own ambiguities, it leaves essentially no doubt of the breadth of its rationale. The Attorney General, in the court's view, simply does not have authority to promulgate a regulation designed to prevent aliens in deportation proceedings from engaging in employment forbidden by law.[3] The major premise in the court of appeals' syllogism is that "[u]nauthorized employment has never been held to justify detention." Pet. App. 57a-58a;[4] see also *id.* at 48a. The court based this assertion largely on the fact that the Attorney General had not previously chosen to exercise his authority in this manner, Pet. App. 33a-37a, as well as on the (incorrect) notion that "detention to prevent unauthorized employment * * * runs contrary to the fundamental policy determinations made by Congress in enacting [the Immigration Reform

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[3] The only conceivable circumstance in which the court below might countenance any employment-related bond condition would be, as respondents note, Br. in Opp. 1, in the unlikely event that such a condition also bears a sufficient relationship to ensuring the alien's appearance at a future hearing or to protecting the public safety or national security. See Pet. App. 23a. Such a theoretical possibility hardly negates the court of appeals' stringent circumscription of the Attorney General's authority.

[4] Due to a printer's error, the bottom two lines at Pet. App. 57a are reversed. See 913 F.2d at 1374.

and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (IRCA)]." Pet. App. 47a. The court of appeals then went on to hold, based on an erroneous reading of prior case law,[5] that, "where there is no power to detain, [bond] conditions *must* be related to ensuring the alien's appearance." Pet.

[5] Like respondents, the court of appeals relied significantly on this Court's decision in *United States* v. *Witkovich*, 353 U.S. 194 (1957), to support its conclusion that, even in the face of broad statutory language, bond conditions necessarily "must be related to ensuring the alien's appearance for deportation." Pet. App. 51a; cf. Br. in Opp. 20. *Witkovich* is inapposite, however, because it involved a different provision of the INA, 8 U.S.C. 1252(d), which authorizes the Attorney General to require aliens under order of deportation to supply information concerning their activities. In placing a limiting construction on that authority, this Court noted that Section 1252(d) powers might be exercised indefinitely, whereas Section 1252(a) powers are necessarily limited by the duration of deportation proceedings. See 353 U.S. at 201 (distinguishing *Carlson* v. *Landon*, 342 U.S. 524 (1952)). Moreover, *Witkovich* also relied on constitutional doubts that would be raised by a broader construction of the authority in question; no similar doubts can be raised here: Congress has already forbidden aliens to engage in unauthorized employment, 8 U.S.C. 1182(a)(14), and the regulation merely seeks to add an additional disincentive to such illegal employment.

While respondents also attempt to rely on *Carlson* v. *Landon*, Br. in Opp. 19-20, that case likewise lends no support to their efforts to limit the Attorney General's authority under Section 1252(a). On the contrary, in *Carlson* the Court upheld the discretion of the Attorney General to exercise that authority to detain alien members of the Communist Party, without bail, pending deportation proceedings. In so doing, the Court rejected the very argument respondents make here, that the *only* proper purpose of detention pending deportation proceedings is to ensure the alien's later appearance. See 342 U.S. at 533-534.

App. 54a (emphasis added). Taken together, these two conclusions make clear that, in the court of appeals' view, the Attorney General has no discretion to bring his authority under 8 U.S.C. 1252(a) to bear on the problem of unauthorized employment by aliens awaiting the conclusion of deportation proceedings.

Despite respondents' invocation of the supposed ambiguity of the regulations as a reason for denying review, Br. in Opp. 13-14, they make no effort to dispute the sweeping nature of the court of appeals' statutory ruling. On the contrary, respondents' lengthy arguments in favor of restricting the Attorney General's statutory discretion repeatedly reflect the court of appeals' view that he may not use his authority under Section 1252(a) even to prevent "unauthorized employment" by aliens during the pendency of deportation proceedings. See, *e.g.*, Br. in Opp. 21, 23, 27. They also argue that Congress's decision, in IRCA, to add only employer sanctions regarding employment somehow "exempts" aliens engaged in illegal employment even from pre-existing statutory provisions. *Id.* at 27-28.

For reasons set forth in our petition, at 17-28, we strongly disagree with such arguments, and with the sweeping result to which they led the court below. The language of the INA is plain, affording the Attorney General broad discretion to impose "such conditions as [he] may prescribe" on release bonds. 8 U.S.C. 1252(a)(1). Nothing in any of this Court's decisions,[6] the legislative history of the INA,[7] or the

[6] See note 5, *supra*.

[7] While we do not intend to refute every point in respondents' lengthy analysis, one particularly misleading quotation warrants mention. In discussing the legislative history of the predecessor of Section 1252, respondents quote a com-

language of IRCA [8] serves to restrict that discretion as the court below has done. But for present purposes, the crucial point is that the validity of that regulation is a question vital to the effective administration of the immigration laws, and since the regulation has been invalidated in a nationwide class action, the question is one deserving of immediate Supreme Court review.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, limited to the second question presented for review.

Respectfully submitted.

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MARCH 1991

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mittee report citing several examples of conditions that might be imposed, followed by the statement that "the Attorney General shall have untrammeled authority to impose *such* conditions . . . ." Br. in Opp. 17 (quoting H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949) (emphasis and ellipsis by respondents)). In truth, the passage in question refers to the Attorney General's "untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond * * *"—thus fully supporting our reading of the statute.

[8] As noted in our petition, at 24-25, IRCA does not address the issue of release on bond, or the conditions that may be attached to such release. Indeed, while IRCA constituted a carefully crafted compromise designed to take *new* steps to prevent illegal employment of aliens, the statute made no effort to modify existing provisions of the immigration laws, or to eliminate any steps available under those existing provisions to curb unlawful employment.

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